Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

OSWALD S. RUSSELL,

Petitioner,

v.

AMERICAN AIRLINES, INC., AMERICAN EAGLE AIRLINES, INC. and FLAGSHIP AIRLINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court erred in affirming the granting of summary judgment regarding a continuous hostile work environment claim due to insufficient notice when racially offensive posters appeared frequently in the workplace, a noose was hung, racial cartoons appeared with regularity on the walls, racial slurs were common, numerous EEOC charges had been filed by other black employees, and when Petitioner had on several occasions complained to the union and base manager who is the highest official at the facility regarding the hostile work environment.

Is Petitioner required to utilize the internal procedure of respondent by filing a complaint out of state with the Human Resources Director in order to survive a summary judgment under *Faragher*.

PARTIES TO THE PROCEEDINGS

Petitioner Oswald Russell was employed at the Respondents as an aircraft mechanic at the Miami International Airport. He was the plaintiff in the district court and appellant in the Eleventh Circuit Court of Appeals.

Respondents American Airlines Inc., American Eagle Airlines Inc. and Flagship Airlines Inc. were defendants in the district court and appellees in the Eleventh Circuit Court of Appeals.

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Appendix B — Order And Final Judgment Of The United States District Court For The Southern District Of Florida, Miami Division Dated And Filed April 21, 1999 ..... 5a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit (App. A) is an unreported judgment and opinion to wit Oswald *Russell v. American Airlines Inc., American Eagle Airlines Inc. and Flagship Airlines Inc., Case No. 99-11187.* The district court (App. B) opinion and judgment is unreported to wit: *Oswald Russell v. American Airlines Inc., American Eagle Airlines Inc. and Flagship Airlines Inc.*, Case No.98-377-MOORE.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on July 6, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

Section 2000e-2(a)(1) states in relevant part:

> It shall be an unlawful employment practice for employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate

against any individual with respect to the compensation, terms, conditions, or privileges of employment, because of such individuals's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Petitioner commenced an action in the United States District Court based in part on a racially hostile environment which violated 42 U.S.C. § 2000e(2)(a)(1).

The hostile work environment was pervasive and ongoing for many years. For example, "Asshole nigger, asshole nigger lead" was written just outside the crew chief office, racial jokes were told on a daily basis to the point that there was a daily racial hate hour among co-workers to exchange racial jokes at the workplace, cartoons frequently appeared on the walls of the facility with the cartoons stating "kill all niggers", racially offensive posters were hung up in the supervisors' trailer's office for substantial periods of time (over a week at a time) such as a picture of a gorilla with Petitioner's name on the poster, a poster of a basketball player with a mop drawn on the head carrying a watermelon, and a poster of an African Warrior, also a stuffed animal with petitioner's name and a rope around the neck, a noose hung from the supervisors' trailer with the words "to hang Dobson" on it, a Polaroid picture of black background with "smiley faces" drawn white correction fluid with a reference to petitioner and a black coworker were found at the job site. (App B at 7a-9a).

Petitioner complained to the union representatives, Frank Gonzalez and Jessie Riviera, union stewards and to John Cordero, union president. Petitioner also complained

on more than one occasion to the base manager, the highest official at the facility concerning the racial harassment. (R[1]1-58-1-10). In addition, there have been four other black employees claiming that defendant has discriminated against them based in part on racial harassment prior to and during the time that petitioner claims to have been subjected to racially hostile work environment. (R1-53).

A. Proceeding Below

Petitioner commenced an action in the United States District Court for the Southern District of Florida (Moore) alleging that he had been discriminated against by reason of his race (black) and retaliation pursuant to the Civil Rights Act of 1964 (Title VII) 42 U.S.C. § 2000, *et seq.*, and 42 U.S.C. § 1981. Subject matter jurisdiction over the action was invoked pursuant to 28 U.S.C. §§ 1331 and 1367 and 42 U.S.C. § 2000e(5)(f). The Respondents moved for Summary Judgment and the motion for Summary Judgment was granted by Summary Judgment dated April 21, 1999. (R1-75-76). The notice of appeal was filed on May 11, 1999. (R1-78). Subject matter jurisdiction rested with the Court of Appeals as the matter was an appeal from a final order of a United States District Court, 28 U.S.C. § 1291.

The Summary Judgment was granted due to the Court finding that the Faragher defense applied and there was insufficient evidence that petitioner followed internal procedures regarding his complaints of discrimination to charge the Respondents with notice of the racially hostile work environment. (App. B at 23a-27a).

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1. "R" refers to the record which was filed in the Court of Appeals.

The Court of Appeals adopted the district's court's opinion and affirmed the district's court judgment. (App. A at 1a-4a).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE SUPREME COURT AND WITH OTHER CIRCUITS

A. The Respondents Knew or Should Have Known of the Racially Hostile Environment and Never Took Remedial Action

The Court of Appeals erred in affirming the granting of summary judgement because the racially hostile work environment was out in the open and was known or should have been known to the Respondents. Also, there was insufficient notice given to Petitioner and others at his level regarding the EEO policies and Respondents failed to adequately respond to the complaints of Petitioner and other coworkers.

In *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), this Court stated that:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment

> action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense compromises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The Court of Appeals is in conflict with the *Faragher* case. The Court of Appeals adopted the reasoning of the district court which held that respondents satisfied both elements of its affirmative defense. App. A at 2a However, it is clear that there was a factual dispute as to whether the employer exercised reasonable care to prevent and correct promptly any harassing behavior. Unlike sexual harassment which is often hidden, in the record developed below was an on going pattern of a racially hostile work environment which was out in the open and in plain view such as the posters hung up in the supervisors trailer for extended periods of time, nooses being hung up, the racial hate hour and other numerous incidents of racial harassment.

In *Moore v. Kuka Welding Systems & Robot Corp.*, 171 F.3d 1073 (6th Cir. 1999), the Court of Appeals held that because the supervisors knew about racial jokes and slurs but did little to correct the problem made them vicariously liable for the conduct, In this case, which is remarkably similar to the case at bar, the plaintiff had been subjected to racial jokes and slurs which the supervisors were aware of

but the company tolerated the behavior. Someone wrote on the bathroom wall "kill all the niggers" References to nigger were frequent and the term "nigger-rigging" was used when a job was done poorly. The Court held that one must show the employer knew or should have known about the conduct and failed to take prompt remedial action. The Court further held that the evidence developed at the trial supported that the respondents knew or should have known about the conduct. In the case at bar, the conduct was much more severe and occurred on a frequent basis. Clearly, for purposes of summary judgment, there was a factual dispute developed in the record as to whether the respondent knew or should have known of the discriminatory hostile atmosphere.

Likewise, the Ninth Circuit has reached a similar logical result. In *Yamagucchi v. United States Air Force*, 109 F.3d 1475 (9th Cir. 1997), the Court held that once the employer becomes aware of the hostile work environment, some form of disciplinary action should be taken by the employer as part of the remedial action. However, in the record below, although there was a perfunctory investigation taken, no disciplinary action was taken against one single employee despite the severity and continuous nature of the harassment which was confirmed by numerous witnesses.[2]

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2. In addition, Judge Gold of the United States District Court for the Southern District of Florida, in *Dobson Collins v. Flagship, Case No. 96-1104-CIV* held on the same exact facts since it was the same facility and the same time Petitioner's claim arose that the respondents could not sustain a Faragher defense because respondents had ample notice of the on going racially hostile work environment such as racially offensive posters that were hanging on the supervisors' office wall for extended periods of time. (R1-53).

In *Coates v. Sundor Brands Inc.*, 164 F.3d 1361 (11th Cir. 1999) the Eleventh Circuit held that an employee must provide adequate notice so that the employer has an opportunity to correct the problem. Here by the multitude of complaints by appellant and others as well as the open and in plain view discrimination which was occurring placed respondents on notice of the foregoing racial practices of respondents.

There was a lack of proper response by the respondents, as evidenced by the fact that the discrimination has continued for years at the facility. Further, it is clear that numerous employees were aware of bias toward black employees but choose to do nothing including conduct which occurred in the presence of supervisors and some of the supervisors were also participating in the hostile work environment including the base manager of the facility.

B. There Was No Notice of EEO Policies Given to Subordinate Employees

For the respondents to prevail on its defense it must prove both: (1) the exercise of reasonable care to prevent and correct promptly any harassing behavior; and (2) that the appellant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Besides not being able to prove prompt remedial action was taken, the respondents cannot prove the employer took adequate preventive measure. Reasonable care of the employer for the first prong of the defense is based on the policy and procedure of the employer which is in place at the time of the harassment, the effectiveness of that policy, the ability of the employer to utilize that policy to promptly and effectively respond to the employee's complaints and to

correct the situation, the effectiveness of the employer's dissemination of information on its policy to the complaining employee, and effective means of allowing the employee to report harassment. As discussed herein, the Respondents was entirely negligent in each of the above items. The policy in place was weak, at best. It required Petitioner who on several occasions complained to the base manager at the Miami International Airport to file a complaint in Nashville, Tennessee. The procedure to implement that policy amounted to little more than promulgating the policy without posting the policy or hold any seminars for its employees to educate them regarding the existence of the policy. The dissemination of the policy was limited to an employee who signed an acknowledgment form when the employee is initially hired of an employee manual.

Put simply, respondents failed to develop a comprehensive anti-harassment policy which prohibits all forms of harassment policy in the form of letters, posting in the workplace, employee handbooks, training sessions, seminars, and meetings. The respondents also failed to provide EEO training as part of employee orientation and did not provide harassment training. In fact, there is no evidence that Petitioner or one single employee received any training of the EEO policies and procedures.[3]

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3. In a second companion case, after summary judgment was denied, the case went to trial and the jury returned a substantial verdict and also awarded punitive damages based upon the same hostile work environment claim as petitioner since they were employed at the same facility during the same time period The jury verdict exceeded nine hundred thousand dollars. *Anthony Lee v. American Eagles, et al., Case No.: 97-0722 MIDDLEBROOKS.*

In conclusion, it is clear that when the facts are applied to the law that respondents are vicariously liable for the acts of its supervisors and has no defense based on the handling of Petitioner's complaints and others and common knowledge of the bias that existed. The lack of training coupled with the lack of an effective posting policy that was utilized renders respondents liable to Petitioner. The Respondents further fails to provide effective means of promptly responding to and correcting the harassment. Clearly, there were issues of fact, especially when construed in a light most favorable to the Petitioner as to whether Petitioner was subjected to a hostile work environment making summary judgment inappropriate.

In sum, there were issues of fact that the harassment was so pervasive as to infer knowledge to the respondents.

II.

THE QUESTIONS PRESENTED ARE IMPORTANT

The questions presented are important. Further clarification regarding the circumstances of when an employer is vicariously liable for an on going (over several years) continuous racially hostile work environment are of critical importance to employers and employees. The Eleventh Circuit appears to follow a standard that if a personnel manual has a complaint procedure and that procedure is not followed that is enough to insulate the employer from liability under *Faragher*. In *Madray v. Public Supermaarkets Inc.*, 208 F.3d 1290 (11th Cir. 2000), the Eleventh Circuit held that despite the fact plaintiff complained to middle level managers about harassment, she had not complained to the contact person in the employee

manual and thus could not be charged with notice. The Eleventh Circuit stated it is incumbent upon the employees to utilize the procedural mechanisms established by the company; therefore, the Court of Appeals concluded that Publix cannot be considered to have been placed on notice. *Madray*, *supra*, at 1300. *See also Farley v. American Cast Iron Pipe*, 115 F.3d 1548 (11th Cir. 1997). Petitioner respectfully submits that if an employer knew or should have known of the racially hostile work environment, and it took no remedial action to correct the hostile environment that the employer should also be held liable.

III.

THE DECISION OF THE COURT OF APPEALS HAS A PARTICULARLY DEBILITATING EFFECT ON MINORITY EMPLOYEES

The Eleventh Circuit standard has a particularly debilitating effect on minority employees. The procedure of being required to file a complaint with the personnel director of the entire company as the only vehicle to bring to the attention harassment is insufficient. The personnel director is located out of State. The procedure requires the employee to go over the head of the highest official, the base manager at Miami International Airport. Put simply, most employees are not willing due to fears of retaliation to file a complaint of this nature with the personnel director for the respondents. The ruling allows the respondents to escape liability despite the fact that the harassment was out in the open and was continuing for a substantial period of time. In sum, the respondents should not be able to allow their inadequate policy on harassment to shield themselves from liability.

CONCLUSION

For the reasons set for above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 6, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11187
D.C. Docket No. 00377-CV-KMM

OSWALD S. RUSSELL,

Plaintiff-Appellant,

versus

AMERICAN AIRLINES, INC., AMERICAN EAGLE AIRLINES, INC., FLAGSHIP AIRLINES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 6, 2000)

Before ANDERSON, Chief Judge, DUBINA and SMITH*, Circuit Judges.

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* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Appendix A

PER CURIAM:

With respect to all three of plaintiff's claims — his claim of discriminatory discharge in December, 1996, his retaliation claim, and his claim of racially hostile environment — we affirm for the reasons indicated by the district court in its April 21, 1999, opinion.

AFFIRMED

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11187
Non-Argument Calendar

District Court Docket No. 00377-CV

OSWALD S. RUSSELL,

Plaintiff-Appellant,

versus

AMERICAN AIRLINES, INC., AMERICAN EAGLE AIRLINES, INC., FLAGSHIP AIRLINES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before ANDERSON, Chief Judge, DUBINA and SMITH*, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern

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* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: July 6, 2000
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: AUG 14 2000

APPENDIX B — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED AND FILED APRIL 21, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case No. 98-377-CIV-MOORE

OSWALD S. RUSSELL,

Plaintiff,

vs.

AMERICAN EAGLE AIRLINES, INC.,

Defendant.

ORDER

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (DE # 32). Response and Reply have been filed.

I. Background

Plaintiff Oswald Russell was an aircraft mechanic employed by Defendant American Eagle Airlines, Inc.[1]

1. At the time of the alleged incidents, Plaintiff's employer was Flagship Airlines, Inc. American is Flagship's successor.

Appendix B

Plaintiff, who is African-American, alleges that fellow employees and supervisors who were either white or Hispanic subjected him to various acts of racial discrimination during the period of his employment. Plaintiff filed suit against Defendant in February 1998, bringing claims under Title VII[2] and Section 1981.[3] Plaintiff's claims arise from three distinct classes of discriminatory acts, which the Court labels as those acts related to: (1) the crew chief demotion; (2) the cowling incident; and (3) hostile environment. The Court describes these classes of acts in turn.

A. Crew Chief Demotion

The first category of acts pertains to Plaintiff's assignment and subsequent removal from a position as "crew chief," also known as "lead mechanic." In August 1993, Plaintiff applied for the position of crew chief. Plaintiff was rejected, even though he claims that these positions were given freely to white and Hispanic mechanics.[4] He only received the crew chief position after filing a union grievance.[5] After he received the crew chief position, Plaintiff states that in September 1993, he was forced to retake a maintenance course that he had previously failed, even though he had numerous licenses and experience.[6] Plaintiff

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2. 42 U.S.C. § 2000e *et seq.*

3. 42 U.S.C. § 1981.

4. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. at 1-2.

5. *See id.* at 2.

6. *See id.*

was eventually removed from the crew chief position in December 1993 for "failure to meet the requirements for crew chief within the allotted time."[7]

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in February 1994. This charge was addressed towards Plaintiff's demotion from the crew chief position.[8] Plaintiff received a right-to-sue notice in June 1996. However, Plaintiff did not file a civil suit for his demotion from the crew chief position within the statutory ninety-day filing period after receiving the notice.[9]

B. Cowling Incident

The second category of discrimination pertains to an incident in December 1996, in which an aircraft that Plaintiff had serviced lost its engine cowling in mid-flight and had to make an emergency landing. Defendant conducted an internal investigation into the incident, and determined that the cowling had come off because Plaintiff had failed to close certain fail-safe mechanisms on the cowling latches.[10] As

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7. *See* Crew Chief Letter dated December 6, 1993, App. to Def.'s Mot. for Summ. J. Tab A, Ex.50.

8. *See* EEOC Discrimination Charge dated Feb. 23, 1994, App. to Def.'s Mot. for Summ. J. Tab A, Ex.35.

9. *See* Dep. of Oswald Russell at 168-69, 251-53, App. to Def.'s Mot. for Summ. J. Tab A (hereinafter "Russell Dep.").

10. *See* AMR Inquiry Report dated December 6, 1996, App. to Def.'s Mot. for Summ. J. Tab A, Ex.33.

a result of the determination that Plaintiff had been at fault in the cowling incident, as well as another incident in February 1996 involving the landing gear of another aircraft, Alberto Alvarez, a manager for Defendant, issued a so-called "Career Decision Day Advisory" ("the Advisory"). An Advisory is an internal disciplinary procedure for employees who have committed infractions that warrant dismissal.[11] The Advisory is part of Defendant's "Peak Performance through Commitment" policy, designed to "induce employees to committed service."[12] If an Advisory is issued to an employee, he is not automatically terminated. Instead, the employee can choose one of three options: (1) retain his position by signing a letter of commitment, in which the signor promises to correct any performance lapses; (2) resign from employment with severance pay; or (3) accept discharge with the right to file a grievance under the Collective Bargaining Agreement between Defendant and its employees.[13] Plaintiff chose the third option, and filed a grievance after discharge.

Plaintiff also filed a charge of discrimination with the EEOC in December 1996. In this second charge of discrimination, Plaintiff claimed racial discrimination and retaliation as the bases of his dismissal pursuant to the cowling incident and the Advisory.[14] Plaintiff received

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11. *See* Decl. of Colleen Scanlon at 1-2, App. to Def.'s Mot. for Summ. J. Tab C.

12. *Id.* at 1.

13. *See id.* at 2.

14. *See* EEOC Discrimination Charge dated December 6, 1996, App. to Def.'s Mot. for Summ. J. Tab A, Ex.1.

a right-to-sue notice in November 1997, and filed the present action in February 1998. While this present action was pending, a neutral arbitrator was appointed in October 1998 under the grievance settlement procedure. The arbitrator conducted an evidentiary hearing. Plaintiff was represented by counsel. The arbitrator issued a report in December 1998 specifically finding that the engine cowling had fallen off the aircraft due to "human error" on the part of Plaintiff.[15] The arbitrator further held that Plaintiff could still obtain reinstatement to his position if he signed the letter of commitment originally offered to him in December 1996. It appears that Plaintiff subsequently signed the letter in February 1999 and has since returned to work.

C. Hostile Environment

In addition to the two discrete acts of demotion and dismissal, Plaintiff also alleges that there has been a continuing pattern of racially offensive acts committed against him by white and Hispanic co-workers. While not all of these alleged acts are racial in character, and few have evidentiary support, the following are the more notable incidents:

(1) Someone wrote the words "Asshole nigger, asshole nigger lead" on a blackboard outside the crew chiefs' office.[16]

(2) A crew chief checked Plaintiff's bag for a misplaced tool. Plaintiff was the only African-American on that shift,

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15. Arbitral Award at 8, App. to Def.'s Mot. for Summ. J. Tab A, Ex.41.

16. Pl.'s Resp. to Def.'s Mot. for Summ. J. at 3.

and no other mechanics were checked. The tool was later located.[17]

(3) Co-workers told racial jokes and drew cartoons on the blackboard in the crew chiefs' office,[18] as well as putting up a stuffed animal with Plaintiff's name and a rope around its neck.[19]

(4) During a so-called "racial hour," workers would get together at the end of the night shift to tell racially offensive jokes and make derogatory comments about racial minorities.[20]

(5) Someone hung a noose from the mechanics' trailer with the words "To Hang Dobson," referring to another African-American mechanic.[21]

(6) Someone posted a Polaroid picture of a black background with two "smiley faces" drawn with white correction fluid. The picture contained the caption: "In the ramp at 10:00 P.M., Dobson and Ozzy," referring to Plaintiff and another African-American mechanic.[22] Defendant now

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17. *See id.*

18. *See id.* at 4.

19. *See* Russell Dep. at 114.

20. *See id.* at 120, 133.

21. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. at 7.

22. *See id.*

moves for summary judgment. Response and Reply have been filed.

II. Summary Judgment Standard

As an initial matter, the Court notes that under Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[23]

Summary judgment may be entered only where there is no genuine issue of material fact.[24] The moving party has the burden of meeting this exacting standard.[25] In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion.[26]

However, the non-moving party "[m]ay not rest upon the mere allegations and denials of [its] pleading, but [its]

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23. Fed. R. Civ. P. 56(c).

24. *See Twiss v. Kury*, 25 F.3d 1551 (11th Cir. 1994).

25. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

26. *See id.*

response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."[27] "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]."[28] The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts."[29] In fact,

> the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.[30]

The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment.[31]

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27. Fed. R. Civ. P. 56(e).

28. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

29. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

30. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

31. *See id.*

Appendix B

III. Discussion

In its Motion, Defendant seeks summary judgment on the grounds that: (1) Plaintiff's claims are time-barred; (2) Plaintiff's negligent role in the cowling incident was a legitimate, non-discriminatory reason for issuing the Advisory; (3) there is no causal link between Plaintiff's filing of an EEOC charge in 1994 and the issuance of the Advisory in 1996, and (4) Plaintiff never reported any racially hostile actions to Defendant's management through established grievance procedures. The Court addresses these arguments in turn.

A. Time Bar

The Court finds that it must grant summary judgment as to that element of Plaintiff's Complaint based on Plaintiff's demotion from the crew chief position in 1993. It is undisputed that Plaintiff received an EEOC right-to-sue notice in June 1996. It is also undisputed that Plaintiff was aware of the ninety-day period in which to file a civil suit based on that right-to-sue notice, and did not in fact file suit within that period.[32] Failure to file a suit on the alleged discriminatory acts within the ninety-day period is grounds for dismissal of that action.[33]

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32. *See* Russell Dep. at 251-53.

33. *See* 42 U.S.C. § 2000e-5(f)(1); *see, e.g., Norris v. Florida Dept. of Health & Rehabilitative Servs.*, 730 F.2d 682 (11th Cir. 1984).

In addition, Plaintiff's demotion occurred in December 1993, but the Complaint was not filed until February 1998. It is therefore also time-barred under Section 1981, which borrows Florida's four-year statute of limitations for personal injury actions.[34]

B. Legitimate, Non-Discriminatory Rationale for Issuing the Advisory

In addition to his claim for demotion from the crew chief position, Plaintiff also claims that Defendant's issuance of the Advisory in 1996 was based on an intent to discriminate on the basis of race. As an initial matter, the Court notes that there is no direct evidence that Defendant's issuance of the Advisory was racially motivated. Plaintiff states that "[i]t's possible," that his race played a role in the decision, but admits that "[he] do[es]n't know."[35] Where there is no direct evidence of discriminatory intent, Title VII discharge/ disparate treatment claims undergo a three-part analysis. First, a plaintiff bears the burden of establishing a prima facie case, i.e., the establishment of a legally mandatory, rebuttable presumption, rather than simply putting forth enough evidence to permit a trier of fact to infer the fact at issue.[36] This generally involves meeting the four-part test

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34. *See Baker v. Gulf & Western Indus., Inc.*, 850 F.2d 1480, 1483 (11th Cir. 1988).

35. Russell Dep. at 296.

36. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 254 n.7 (1981); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 963 (11th Cir. 1997).

articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[37] In order to establish a prima-facie case under *McDonnell Douglas*, a plaintiff must show that: (i) he is a member of protected minority; (ii) he was qualified; (iii) he was subjected to an adverse employment action; and (iv) the defendant treated similarly situated employees outside the class more favorably.[38] The burden then shifts to the defendant to produce a legitimate, non-discriminatory explanation for the adverse action.[39] If defendant can do so, the burden then shifts back to the plaintiff to rebut defendant's explanations;[40] ultimately, the plaintiff bears the burden of carrying his case.[41]

The Court finds that it must grant summary judgment against Plaintiff. Assuming, *arguendo*, that there is enough evidence to support a prima facie case,[42] Defendant has

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37. 411 U.S. 792 (1973).

38. *See id.*; *Combs v. Plantation Patterns*, 106 F.3d 1519, 1539 n.11 (11th Cir. 1997).

39. *See Burdine*, 450 U.S. at 253; *Evans*, 131 F.3d at 963.

40. *See Burdine*, 450 U.S. at 253; *Evans*, 131 F.3d at 964-65.

41. *See Burdine*, 450 U.S. at 253; *Evans*, 131 F.3d at 963.

42. At the very least, Plaintiff can meet the first three conditions: (1) As an African-American, Plaintiff is a member of a protected minority; (2) Plaintiff was qualified to do his job; and (3) the Advisory was an adverse employment action. However, as discussed more fully *infra*, there is some dispute as to whether similarly situated non-African-American employees were treated more favorably.

presented a well-supported legitimate, non-discriminatory rationale for issuing the Advisory. In response, Plaintiff has not advanced sufficient evidence to create a material issue of fact as to whether Defendant's legitimate, non-discriminatory rationale for issuing the Advisory is pretextual.

Defendant's legitimate, non-discriminatory explanation for why Plaintiff was issued the Advisory is that Plaintiff failed to properly secure an engine cowling on an aircraft he serviced, and as a result of that failure, the engine cowling came off in mid-flight, forcing the aircraft to make an emergency landing. This rationale is amply supported by the evidence. Defendant's management conducted an internal investigation and concluded that the incident was the result of Plaintiff's failure to engage certain fail-safe mechanisms on the cowling latches.[43] Specifically, the investigators found that "[t]he chain of events leads to the conclusion of the [Plaintiff] closing cowling door, pushing latches (both) to the closed position, *but not fully engaging the fail safe mechanism of the latch.*"[44] The conclusions of the internal investigation were subsequently affirmed by the neutral arbitrator in December 1998. After hearing the parties' presentation of evidence and arguments, the arbitrator found that "the most probable cause of the opening of the cowling hood was human error on part of grievant."[45] While neither

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43. *See* AMR Inquiry Report dated December 6, 1996, App. to Def.'s Mot. for Summ. J. Tab A, Ex.33.

44. *Id.*

45. Arbitral Award at 8, App. to Def.'s Mot. for Summ. J. Tab A, Ex.41.

the results of the internal investigation nor the findings of the arbitrator have any dispositive effect on this Court's consideration of the evidence, the Court accords them substantial weight, especially in light of the fact that Plaintiff has not intimated that the arbitrator was anything but neutral and competent.[46]

"A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence."[47] Plaintiff must, at this point, reestablish the validity of his prima facie case through rebuttal evidence.[48] In order to properly rebut a defendant's legitimate, non-discriminatory rationale, a plaintiff "may not . . . merely rest on the laurels of her prima facie case in the face of powerful justification evidence offered by the defendant."[49] Against the weight of the evidence that appears to show that Defendant issued the Advisory because of Plaintiff's failure to properly secure the cowling latch, which forced a passenger airplane to make an emergency landing,

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46. The findings of an arbitration proceeding can be highly probative, and federal courts should weigh the probity of such findings based on: (1) the degree of procedural fairness in the arbitral forum; (2) the adequacy of the record; and (3) the competence of the arbitrator. *See Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 117 (5th Cir. 1997).

47. *Burdine*, 450 U.S. at 255-56 n.10.

48. *See id.*; *Evans*, 131 F.3d at 964-65.

49. *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987).

Plaintiff offers three lines of argument, all notably lacking in evidentiary support.

First, Plaintiff appears to attack the validity of the conclusions of the internal investigation and the arbitrator. He claims that he closed the cowling latches, and as the detached cowling was never found, the Court should disregard the findings of both the internal investigators and the neutral arbitrator and instead embrace another explanation, i.e., that the cowling fell off for some other, unspecified mechanical reason. Aside from his protestations of innocence, Plaintiff offers absolutely no evidence to show that there was in fact another explanation for the incident. This is clearly inadequate to rebut the conclusion that as a factual matter, the cowling fell off due to Plaintiff's maintenance failure.[50]

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50. While Plaintiff has failed to discuss a legal framework for assessing his argument that the engine cowling detached for other reasons, the doctrine of res ipsa loquitur compels the inference that Plaintiff's negligence caused the accident. Under this doctrine, it is possible to infer negligence if: (1) the instrumentality involved was within the exclusive control of the defendant at the time of the injury; and (2) the injury is one which would not ordinarily occur in the absence of negligence. *See Burns v. Otis Elevator Co.*, 550 So. 2d 21, 22 (Fla. Dist. Ct. App. 1989). It seems fair to say that engine cowlings do not normally come off in mid-flight, absent some sort of negligence. In addition, it appears that Plaintiff was in exclusive control of the engine cowling, having been the last person to close the cowling while the plane was taxing on the runway. This leads the Court to believe that the evidence overwhelmingly supports the inference that Plaintiff was responsible for the cowling incident. In reply, Plaintiff claims that the cowling came off "because a nut,

(Cont'd)

Secondly, Plaintiff seems to suggest that the engine cowling may have fallen off due to the work of unnamed saboteurs. He claims, without evidence other than his own statements to the effect, that in late 1993, someone let the air out of the tires on an aircraft for which Plaintiff was responsible.[51] He further claims that in 1994, someone removed a seat belt that Plaintiff had installed.[52] Finally, Plaintiff claims that in late 1994, Plaintiff saw another mechanic "interfering" with a beacon light on a plane for which Plaintiff was responsible, and that this mechanic had been "around" during previous acts of sabotage.[53] If Plaintiff is suggesting that co-workers sabotaged aircraft and endangered passengers' lives to lay the blame on him for the accidents that might result, he needs more and better evidence than this specious conspiracy theory.

Plaintiff's final line of rebuttal is that even if he was responsible for the cowling incident, Defendant's response

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(Cont'd)
washers and cotter pin were never installed by the mechanic that conducted the original installation." *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. at 6-7. However, Plaintiff again fails to provide any evidence to support his statements. Plaintiff cannot rely on such unsubstantiated speculation about other possible explanations to defeat the inference of negligence. *See McDougald v. Perry*, 716 So. 2d 783, 786 (Fla. 1998).

51. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. at 4.

52. *See id.*

53. *See id.* at 4-5.

must have been racially motivated because other non-African-American mechanics were never disciplined as harshly for similarly negligent repairs or maintenance. Plaintiff claims that there were numerous incidents, including: (1) In 1993, a mechanic named Felix Sorda damaged the engines on an aircraft that caused "$100,000's of thousands of dollars," and grounded the aircraft for three days.[54] (2) In 1995, a mechanic named Larry Sheet caused damage to an aircraft resulting in "thousands of dollars" in damage, but was never reprimanded.[55] (3) In 1997, three white mechanics negligently damaged an aircraft resulting in "$1 million in damage." While they were not disciplined, their African-American supervisor was suspended.[56] (4) In 1998, an aircraft lost an engine exhaust covering in mid-flight. The white mechanic "responsible for this incident" was never disciplined.[57] (5) In 1999, an aircraft had to make an emergency landing because its engine cowling was "partially torn open." Plaintiff states that the two Hispanic mechanics who had serviced the aircraft were never disciplined, even though this was "similar" to the incident for which Plaintiff was disciplined.[58]

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54. *Id.* at 5.

55. *Id.*

56. *Id.* at 6.

57. *Id.*

58. *Id.*

The Court finds that this last line of rebuttal must also be rejected. Plaintiff has not submitted any evidence to support these contentions aside from his own statements that such events occurred.[59] There is no way to know where Plaintiff is getting such information, or to assess the validity of his conclusions regarding fault, circumstances, or amount of damage. There is absolutely, and inexplicably, no evidence from any other source, such as company records or other witnesses, to corroborate Plaintiff's statements. Without such evidence, the Court cannot begin to determine whether these other incidents were suitably "similar" to the cowling incident[60] to raise an inference of discriminatory intent behind the issuance of the Advisory.

In the near-total absence of evidence to rebut Defendant's legitimate, non-discriminatory rationale for disciplining Plaintiff, the Court holds that summary judgment must be granted against Plaintiff on his Title VII claim arising from the issuance of the Advisory. Furthermore, the Court holds that summary judgment must be granted against Plaintiff to the extent that his claims also arise out of Section 1981.[61]

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59. *See* Pl.'s Aff. ¶¶ 33-34, 39-42.

60. *See Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) (requiring plaintiff to show existence of other "similarly situated" employees in a disparate treatment claim).

61. The *McDonnell Douglas* framework for proving intentional race discrimination in the Title VII context is applicable to Section 1981 claims. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 185-87 (1989); *Robertson v. Home Depot, Inc.*, 976 F. Supp. 1467, 1477 n.9 (S.D. Fla. 1997).

Appendix B

C. Causality

Plaintiff also claims that the Advisory was issued in retaliation for his filing of his first EEOC charge in 1994. Title VII retaliation claims undergo an analysis similar to the one for disparate treatment claims. A plaintiff must establish a prima facie case; he must show that: (1) he was engaged in a protected activity; (2) there was an adverse employment action; and (3) there was a causal connection between the protected activity and the resultant adverse action.[62] The Court finds that it must grant summary judgement against Plaintiff's retaliation claim because there is no evidence to create a material issue of fact as to the causal connection between the filing of the EEOC charge and the issuance of the Advisory.

It is undisputed that the Advisory was issued in December 1996, nearly three years after the filing of the first EEOC discrimination charge in February 1994. Such a long time interval between the EEOC discrimination charge and the alleged act of retaliation,[63] coupled with the fact that there is no evidence of causality between the two events, leads this Court to conclude that Plaintiff has failed to establish a prima facie case of retaliation.

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62. *See Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994).

63. *See, e.g., Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539 (S.D. Fla. 1995) (finding a lack of causality where there is a significant length of time between the protected activity and the alleged act of retaliation).

Appendix B

D. Hostile Environment

The Court finds that there is sufficient evidence in the deposition testimony of co-workers to create a material issue of fact as to whether Plaintiff was subjected to a racially hostile work environment. These incidents — of which the hanging of a noose is particularly appalling — have absolutely no place in our society, and there can be no doubt that such incidents would create a "working environment[ ] so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[64]

However, as deplorable as these incidents are, the Court finds that it must grant summary judgment against Plaintiff on his claim for hostile environment. Plaintiff has failed to present any evidence to create a material issue of fact as to Defendant's affirmative defense under *Faragher v. City of Boca Raton*.[65] The *Faragher* defense states that an employer cannot be held vicariously liable for a hostile environment created by co-workers if two conditions are met: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the plaintiff employee unreasonably failed to take advantage of any

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64. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986). The Court notes that Defendant does not deny that the "hanging rope" incident occurred, but merely that it was directed at another employee. *See* Def.'s Reply at 6.

65. 118 S.Ct. 2275 (1998).

preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[66]

Defendant has met both conditions of the *Faragher* defense. The promulgation of an anti-harassment policy with a complaint procedure is generally sufficient to address the first prong of the defense.[67] Defendant has submitted evidence to show that it has an internal grievance procedure, outlined in its Employee Handbook. The Handbook states that "American Eagle maintains a workplace which is free from discrimination or harassment . . . . Reports of sexual or any other form of harassment should be reported immediately to the Personnel Director."[68] In addition, there is evidence that the policy was sufficiently disseminated to the employees, and that Plaintiff knew about Defendant's internal grievance procedure. Plaintiff signed the Employee Handbook Notice.[69] Furthermore, Plaintiff stated in his deposition that "there was a policy with regard to

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66. *See id.* at 2292. A third, implicit condition is that the hostile environment did not involve a tangible employment action. *See id.* The Court finds that this third condition is also satisfied because there is no evidence that the tangible employment actions in this case, the crew chief demotion and the Advisory, were related to the incidents creating the hostile environment.

67. *See id.* at 2293.

68. Employee Handbook § 3 at 2, App. to Def.'s Mot. for Summ. J. Tab A, Ex.7.

69. Employee Handbook Notice, App. to Def.'s Mot. for Summ. J. Tab A, Ex.6.

harassment,"[70] and that he was aware of such a policy, possibly as early as 1994.[71]

The second prong of the *Faragher* defense is satisfied because there is no evidence — aside from his own nonspecific allegations — to show that Plaintiff ever brought the incidents that allegedly created the hostile environment to the attention of Defendant through those internal procedures.[72] Plaintiff states that he went repeatedly to management and "nothing happened."[73] However, Plaintiff has not pointed to any corroborating evidence to show that he in fact filed complaints with management and that no action was taken. Unable to support his claims that he went to management to complain about the racially hostile incidents, Plaintiff offers up the explanation that he "knew management was not going to do anything about it,"[74] and he had "given up on management."[75]

To the contrary, the evidence that is available suggests that Plaintiff never raised these racially hostile incidents even

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70. Russell Dep. at 53.

71. *See id.* at 54.

72. *See id.* at 116 (Plaintiff stating that he never brought the incidents to the attention of Human Resources).

73. *Id.* at 98.

74. *Id.* at 112.

75. *Id.* at 115.

in the face of ample opportunities to do so. Neither the February 1994 nor the December 1996 EEOC discrimination charges mention any of the racially hostile incidents. At one point, Defendant invited Plaintiff come to Nashville, Tennessee to participate in its investigation of Plaintiff's 1994 EEOC charge regarding his crew chief demotion. There is no evidence that shows that Plaintiff took advantage of this opportunity to raise these incidents with Defendant's investigators. Instead, it appears that the investigation only dealt with the crew chief demotion itself. It appears that Defendant again invited Plaintiff to participate in a follow-up investigation into the crew chief demotion in January 1995. According to his deposition, Plaintiff refused to attend this second investigation, based on his opinion that Defendant was taking too long with its investigations and that the whole process was "disingenuous."[76]

While the Court is certainly sympathetic to Plaintiff's claim that his co-workers created a racially hostile environment, its hands are bound if Plaintiff cannot demonstrate that he first attempted to resolve the situation through Defendant's internal complaint procedures. For this reason, the Court must grant summary judgment against Plaintiff on his claim for hostile environment.[77]

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76. *See id.* at 276-77.

77. In no way should Defendant read this Order as a carte blanche to indulge in any complacency regarding the racial environment at its facilities. To the extent that Defendant now has clear notice that employees at its facilities may very possibly have engaged in racially offensive acts in the past, it should make sure that such behavior is completely eradicated and does not reoccur in the future.

Appendix B

IV. Conclusion

Based on the foregoing, it is ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (filed February 25, 1999, DE # 32) be, and the same is hereby, GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of April, 1999.

s/ K.M. Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 98-377-CIV-MOORE

OSWALD S. RUSSELL,

Plaintiff,

vs.

AMERICAN EAGLE AIRLINES, INC.,

Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (DE # 32). On April 21st, 1999, the Court entered an Order granting Defendant's Motion for Summary Judgment. Accordingly, it is

ORDERED AND ADJUDGED that Final Judgment is entered in favor of Defendant American Eagle Airlines, Inc., and against Plaintiff Oswald S. Russell. Plaintiff Oswald S. Russell shall take nothing.

LET EXECUTION ISSUE.

Appendix B

The Clerk of the Court is directed to mark this case as CLOSED. All pending motions not otherwise ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of April, 1999.

s/ K.M. Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 13 2000
OFFICE OF THE CLERK

No. 00-551

IN THE
Supreme Court of the United States

OSWALD S. RUSSELL,
Petitioner,

v.

AMERICAN AIRLINES, INC., AMERICAN EAGLE AIRLINES, INC., AND FLAGSHIP AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether the district court properly ruled, as a matter of law, that petitioner's employer maintained reasonable procedures to prevent and correct harassing behavior, and did not have timely notice that Petitioner believed he had been subjected to racial harassment.

STATEMENT PURSUANT TO RULE 29.1

The successor to Respondent Flagship Airlines, Inc., is American Eagle Airlines, Inc. The parent company of Respondent American Eagle Airlines, Inc., is AMR Eagle Holding Corporation. The parent company of AMR Eagle Holding Corporation and of Respondent American Airlines, Inc., is AMR Corporation. American Airlines, Inc., was dismissed in the district court. None of the Respondents has any non-wholly owned subsidiaries.

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IN THE

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No. 00-551

OSWALD S. RUSSELL,

Petitioner,

v.

AMERICAN AIRLINES, INC., AMERICAN EAGLE AIRLINES, INC., AND FLAGSHIP AIRLINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, by their undersigned counsel, submit this brief in opposition to the petition for a writ of certiorari in this case. The district court decision at issue is reported at 46 F. Supp. 2d 1330.

STATEMENT OF THE CASE

This petition seeks review of a *per curiam* decision affirming summary judgment for Respondent Flagship Airlines, Inc. ("Flagship"),[1] on claims by petitioner Oswald

[1] At the time of the alleged incidents, Russell's employer was Flagship Airlines, Inc. American Eagle Airlines, Inc., is Flagship's successor. (Pet. App. B at 5a, n.1.) All references herein to Russell's employer will be to Flagship.

Russell ("Russell") that he had been subjected to racial harassment in violation of Title VII and §1981. The district court properly concluded that Flagship did not have the opportunity to enforce its anti-harassment policy for preventing and remedying harassing behavior because Russell elected not to notify the company that he believed he had been harassed. (Pet. App. B at 24a-26a.)

The court of appeals' *per curiam* affirmance raises no important or controversial federal question. (Pet. App. A.) Moreover, there is no con-flict among the circuits on any of the issues Russell seeks to present, and no conflict with any decision of this Court. Accordingly, further review is not warranted, and Flagship respectfully submits that the petition for a writ of certiorari should be denied.

A. Russell's Lawsuit

Russell, who is African-American, was an aircraft mechanic employed by Flagship. (Pet. App. B at 5a.) Russell filed this action in February 1998, bringing claims under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e *et seq.*), and Section 1981 (42 U.S.C. §1981). (*Id.* at 6a.) Russell's claims arose from his discharge in December 1996, after he committed an error that resulted in a serious flight safety incident. Russell also alleged in his complaint that in December 1993, more than four years before he filed his lawsuit, he was wrongfully demoted from lead mechanic to mechanic. Russell further alleged several incidents of racially harassing behavior by unidentified perpetrators against himself and other employees, which allegedly occurred at unspecified times prior to February 1995. (*Id.* at 7a-8a.)

The petition addresses only Russell's hostile work environment claim.

B. The Employment Decision Underlying this Action—Russell's Discharge in December 1996

The employment decision that prompted this action was Russell's discharge in December 1996 for failure to secure a "cowling" (or cover) for an aircraft engine, which resulted in the aircraft's emergency landing, and potential endangerment of the aircraft, passengers, crew, and persons on the ground. (*Id.* at 7a.) After investigation of the incident, Russell was discharged.[2] (*Id.* at 7a-8a.) Russell filed a grievance under a collective bargaining agreement with Flagship, and filed a charge of discrimination with the EEOC. (*Id.* at 8a.)

Notably, Russell did *not* include in his EEOC charge any allegations that he had been subject to racial harassment during his employment with Flagship. (*Id.* at 8a.) Moreover, although the collective bargaining agreement prohibits racial discrimination, and Russell was represented by counsel at the hearing on his union grievance, Russell did *not* raise any allegations of racial harassment in the hearing conducted by a neutral arbitrator regarding his discharge.[3] (Def.'s Mot. for Summ. J. at 5 & App. Tab A.)

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[2] Flagship actually issued a "Career Decision Day" advisory, which is an advisory reserved for serious disciplinary measures when discharge might be in order but where a "last chance" is offered. This advisory offers the employee the options of: (1) signing a Letter of Commitment to return and correct performance issues; (2) resigning with an offer of severance pay; or (3) accepting discharge with the right to file a grievance under the collective bargaining agreement. Russell opted for discharge with the right to file a grievance. (Pet. App. B at 8a.)

[3] The arbitrator determined that Russell had been negligent in failing to secure the cowling. The arbitrator ruled that Russell could be reinstated to employment only if he would sign the Letter of Commitment Flagship originally offered to him in December 1996. In February 1999, Russell signed the Letter of Commitment, and returned to work as a mechanic with Flagship's successor, American Eagle Airlines, Inc. (Pet. App. B at 9a.)

C. Russell Failed to Notify Flagship of Alleged Racial Harassment, Despite Multiple Opportunities to Complain

The first time Russell raised allegations of racial harassment was as part of the Complaint filed in this action, in February 1998.[4] The district court found that Russell failed to notify Flagship that he believed he had been subjected to racial harassment, despite multiple opportunities to complain. (Pet. App. B at 25a-26a.)

1. *Russell Failed to Notify Flagship of Alleged Racial Harassment in his February 1994 EEOC Charge*

In February 1994, Russell filed a charge of discrimination with the EEOC, claiming that, in December 1993, he had been demoted from lead mechanic to mechanic based on racial discrimination. (*Id.* at 7a.) Russell did *not* state any allegations of racial harassment in his EEOC charge. (*Id.* at 26a.) Moreover, Russell did not discuss any incidents of racial harassment with Flagship when he traveled to Nashville in connection with a grievance he filed over his demotion. (*Id.*) Russell received a right to sue letter from the EEOC in June 1996, but abandoned his claim. (*Id.* at 7a.)

2. *Russell Failed to Notify Flagship of Alleged Racial Harassment During a September 1994 Investigation by Flagship*

In September 1994, Russell was interviewed by Flagship's human resources department in Nashville as part of an

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[4] Russell's broad assertions of alleged harassing behavior in the petition are not supported by the evidence that was before the district court. Flagship does not further address this matter here, however, because the issue of whether Russell could create a genuine factual issue as to an actionable hostile work environment was not the basis for the district court's decision. (Pet. App. B at 23a.)

extensive investigation into vague allegations of racial discrimination at Flagship's Miami's maintenance facility, which had been submitted by a white employee during an unemployment hearing. (Def.'s Mot. for Summ. J. at 19; Def.'s St. of Undisputed Facts at ¶¶ 60-61.) At the September 1994 meeting, Russell did not disclose that he thought he had been subjected to racial harassment. (*Id.*) Russell mentioned *only* the Polaroid picture described in his petition, and offered no evidence that might have assisted Flagship in finding the source of the picture or evidence of any other incidents. (*Id.*) Furthermore, in January 1995, when Russell's attorney contacted Flagship's counsel indicating there might be additional evidence of harassment directed at other employees, Flagship invited Russell and his attorney to again travel to Nashville. (Pet. App. B at 26a.) Russell declined even to respond. (*Id.*)

3. *Russell Failed to Notify Flagship of Alleged Racial Harassment in the Arbitration of His Grievance or in his December 1996 EEOC Charge in Connection with his Discharge*

Moreover, as set forth above, Russell did not raise any alleged harassing incidents in the EEOC charge he filed in December 1996, claiming that his discharge for the "cowling" incident was racially motivated. Moreover, Russell did not mention any racial harassment in the arbitration of the grievance he filed in relation to his discharge.

D. Flagship Developed, Distributed, and Implemented an Anti-Harassment Policy, Which Included Internal Complaint Procedures

Flagship has an established policy against discrimination and harassment on any legally protected basis which it distributes to its employees, through its Employee Handbook. The policy provided that employees should report alleged

discrimination or harassment to Flagship's Personnel Director. (Pet. App. B at 24a.)

Russell admitted that he knew of Flagship's policy and complaint procedure, and admitted that he knew of the grievance procedure available to him under the collective bargaining agreement that also prohibited discrimination and harassment. (*Id.*; Def.'s St. of Undisputed Facts at ¶¶ 50-51.) Indeed, Russell's internal complaint about his demotion in December 1993 resulted in a company investigation of that employment decision. (Pet. App. B at 26a.)

Moreover, allegations of racial discrimination raised by a white employee during an unemployment proceeding in September 1994 resulted in an extensive investigation of the entire maintenance facility in Miami. (Def.'s Mot. for Summ. J. at 19; Def.'s St. of Undisputed Facts at ¶ 60.) Even though Flagship found no evidence of racially discriminatory decisions and received no evidence identifying any perpetrators of harassing conduct, in order to deter potentially harassing acts in the future, Flagship's President issued a memorandum in February 1995 to all employees re-emphasizing the policy that any proven racially hostile actions would result in immediate discharge. (*Id.* at 63.) There is no evidence that any of the racially harassing incidents alleged by Russell occurred after that time period.

E. The Proceedings Below

The district court granted summary judgment for Flagship on all of Russell's claims. (Pet. App. B at 27a.) Specifically, with respect to Russell's hostile work environment claim, the district court held that Russell "failed to present any evidence to create a material issue of fact as to [Flagship's] affirmative defense under *Faragher v. City of Boca Raton*." (*Id.* at 23a.) Rather, the district court held that, as a matter of law, Flagship had met both conditions of the *Faragher* defense. First, the undisputed evidence showed that Flagship sufficiently disseminated an anti-harassment policy with a

complaint procedure to its employees, and that Russell admittedly knew about the policy. (*Id.* at 24a-25a.) Second, there was no evidence to show that Russell ever brought the incidents that allegedly created the hostile work environment to the attention of Flagship through the internal complaint procedures, despite "ample opportunities to do so." (*Id.* at 25a-26a.)

After full briefing and oral argument, the court of appeals affirmed the district court's decision, for "the reasons indicated by the district court." (Pet. App. A at 1a-2a.)

ARGUMENT

Russell seeks to have this Court review narrow issues of fact relating to his failure to complain about alleged racial harassment. The *per curiam* decision of the court of appeals, affirming summary judgment for Flagship, is not inconsistent with any decision of this Court or any decisions of other federal courts of appeals. Further review is not warranted.

I. THE COURTS BELOW CORRECTLY REJECTED RUSSELL'S CLAIMS OF RACIAL HARASSMENT BECAUSE FLAGSHIP DID NOT HAVE NOTICE OF HIS CLAIMS, AND BECAUSE IT EXERCISED REASONABLE CARE TO PREVENT AND PROMPTLY CORRECT HARASSING BEHAVIOR

The record evidence clearly supported the district court's finding that Flagship had a well-publicized harassment policy and complaint procedure, of which Russell admittedly was aware. (Pet App. B at 24a-25a.) Although Russell quibbles that Flagship could have provided a different complaint procedure, or could have provided earlier training sessions to employees (Pet. at 8), he does not and cannot cite any case that allows an employee to dictate the nature of an employer's anti-harassment program. Indeed, the Court has recognized that promulgation of an anti-harassment policy, with a

complaint procedure allowing an employee to bypass a harassing supervisor, generally will suffice to meet the first prong of the employer affirmative defense to vicarious liability. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998). Moreover, the evidence showed that Flagship appropriately responded to complaints made by other employees in September 1994, and that no racial harassment has been alleged after such time period.

Second, the record evidence clearly supported the district court's finding that Russell failed to notify Flagship of his view that he believed he had been subjected to racial harassment. (Pet. App. B at 25a-26a.) Indeed, Russell's failure to inform Flagship of his view that he had been subjected to racial harassment is vividly evident in the record. Not only is there no direct evidence of such notice, but the record also establishes that Russell made no reference to alleged harassing incidents in his 1994 EEOC charge regarding his demotion, or in the investigation or grievance of his demotion claim, or in his 1996 EEOC charge regarding his discharge, or in the arbitration of the grievance relating to his discharge. In addition, although Russell provided a Polaroid picture during the 1994 investigation, he had not previously reported its appearance in the workplace, and offered no assistance in identifying its source. The district court properly found that Russell's silence on each of these occasions constituted an unreasonable failure to take advantage of the corrective opportunities provided by Flagship. *See Faragher*, 524 U.S. at 778 (employee's failure to use complaint procedure normally will suffice to satisfy second element of employer's defense); *see also Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir.), *cert. denied*, 121 S. Ct. 303 (2000).

II. THE DECISION, BELOW IS CONSISTENT WITH *FARAGHER V. CITY OF BOCA RATON*, AND SUBSEQUENT DECISIONS OF THE COURTS OF APPEALS APPLYING *FARAGHER*

A. The Lower Courts' Decisions Are Consistent with this Court's Decision in *Faragher*

Russell asserts that the decisions below conflict with *Faragher* and with subsequent court of appeals decisions applying that case. (Pet. at 4.) This is incorrect. Both the legal standards and the factual approach adopted by the district court are consistent with *Faragher* and its progeny.

Indeed, the alleged *Faragher* conflict is nothing more than Russell's disagreement with the district court's conclusion that Flagship exercised reasonable care to prevent and correct promptly any harassing behavior. (Pet. App. B at 23a-24a.)[5] This factual quarrel with the court's conclusion is not a "conflict," and certainly not one appropriate for review in this Court.

In fact, Flagship's harassment policy, as described above, was consistent with *Faragher*'s requirements. Russell's significant shortcoming was his own repeated failures to notify Flagship that he believed he had been subjected to racial harassment. Russell elected not to come forward even after Flagship actively involved him in an investigation of his earlier charge of employment discrimination, and in an investigation of allegations made by another employee. The *Faragher* focus on the reciprocal responsibilities of the employer and the employee to deal with issues of

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[5] Russell's argument for review in this Court is grounded in his belief that there "were issues of fact . . . making summary judgment inappropriate." (Pet. at 9.) This argument only serves to underscore that the district court's decision does not conflict with legal precedent, and that Russell merely disagrees with the district court's assessment of the factual record.

employment discrimination was intended to avoid just this situation, where an employee first communicates his claims when files his court complaint. *See generally Faragher*, 524 U.S. 775.

B. The Lower Courts' Decisions Are Consistent with Subsequent Decisions of the Courts of Appeals Applying *Faragher*

There is no conflict between this case and the cases that have followed *Faragher*. To the contrary, the three decisions cited by Russell support the correctness of the decisions that are the subject of this petition.

The court of appeals' decision in *Coates v. Sundor Brands*, 164 F.3d 1361 (11th Cir. 1999), is remarkably similar to the present case in background, rationale, and outcome. The court there concluded that the employee did not properly put the employer on notice of the problem in a timely fashion, and when notice eventually was given, the employer responded reasonably to the complaint. *Id.* at 1365-66. The Eleventh Circuit emphasized a point made by this Court in *Faragher*—that employers and employees both have responsibilities to correct workplace harassment:

> Federal law has now attempted to correct the problem of workplace discrimination, but it cannot be done without the cooperation of the victims, notwithstanding that it may be difficult for them to make such efforts. When an employer has taken steps, such as promulgating a considered sexual harassment policy, to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer's directives have been breached so that the employer has the opportunity to correct the problem.

Id., at 1366.[6]

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[6] Similarly, in *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir.), the court of appeals held that it is incumbent on employees to

Russell also cites a Sixth Circuit decision and a Ninth Circuit decision as allegedly inconsistent with the ruling below. (Pet. at 5-6). In fact, the courts of appeals, in those cases, as here, similarly analyzed notice and response to determine employer liability. The different outcomes in the Sixth and Ninth Circuit cases do not give rise to any conflict; they merely reflect the different facts of those cases.

In *Moore v. Kuka Welding Sys. & Robot Corp.*, 171 F.3d 1073 (6th Cir. 1999), the plaintiff was subject to racial slurs and jokes as part of the "every-day banter" in the workplace. *Id.* at 1079. The court of appeals ruled that the employer was "on notice" of the conduct because a supervisor observed and in some instances contributed to the offensive conduct, yet the employer "did little to correct [the] problem." *Id.*

In *Yamaguchi v. United States Air Force*, 109 F.3d 1475 (9th Cir. 1997),[7] it was undisputed that the plaintiff properly followed the employer's procedures to complain that she had been subject to sexual harassment (her complaint included allegations of forcible rape). *Id.* at 1483. Although the alleged perpe-trator was assigned to a different base than plaintiff, he was not officially disciplined. *Id.* at 1479, 1483. The Ninth Circuit affirmed the district court's denial of summary judgment on the issue of employer liability because a factual dispute remained as to whether the actions taken in response to the plaintiff's complaint were adequate remedial measures. *Id.* at 1483.

Here, in contrast to *Moore* and *Yamaguchi*, the evidence is undisputed that Russell did *not* notify Flagship that he believed he was subjected to racial harassment, despite Russell's admitted knowledge of Flagship's anti-harassment

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use the articulated procedures that the employer makes available to redress acts of discriminatory hostility, and that failure to do so is fatal to a later claim in court.

[7] *Yamaguchi* was decided before this Court's decision in *Faragher*.

policy and ample opportunity to complain. Moreover, when other harassment allegations were brought to Flagship's attention by another employee, the harassment was not tolerated by Flagship. Rather, Flagship immediately launched an investigation, and re-emphasized its policy against harassment despite its conclusion that no adverse employment action had occurred. The fact that there are no allegations of harassment after this time period demonstrates the effectiveness of Flagship's response.

C. The Questions Presented Already Have Been Addressed in *Faragher*, and Do Not Justify Russell's Requested "Clarification"

Russell makes the conclusory assertion that "[t]he questions presented [by the petition] are important." (Pet. at 9.) The basis for this alleged importance is not clear, but appears to be based on Russell's perception of a need for some sort of "clarification" of the standards under which an employer can be held vicariously liable for an actionable hostile work environment. (Id.)

This Court already has addressed, in detail, the standards for employer liability in *Faragher*, and in the companion decision of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). There is nothing in the petition, other than Russell's unsupported assertions, to suggest that the lower courts here in any way deviated from these standards. Moreover, this case does not provide an appropriate opportunity for further discussion of questions of harassment policy awareness, and employer notice and response, because Russell was indisputably aware of the policy, yet elected not to bring his allegations to the attention of his employer.

The decision below is consistent with the policy objectives of *Faragher*—*i.e.*, that employers should have a procedure to respond to notice that harassment may be taking place,

employees should use those procedures, and employers should deal effectively with the results of their investigations. Nothing in the decision below is incompatible with those objectives. If anything, the lower courts' rulings point up the importance of a well-publicized procedure and the importance of timely employee complaints.

D. There is No Support for Russell's Assertion That the Decision in this Case Will Have "A Particularly Debilitating Effect on Minority Employees"

Finally, Russell asserts that the decision below sets some unspecified standard that will have a "particularly debilitating effect on minority employees." (Pet. at 10.) This assertion, and Russell's corresponding assertion that "most employees are not willing due to fears of retaliation to [go over the head of the base manager] to file a complaint of this nature with the personnel director for [Flagship]" (*id.*), are unsupported by any evidence or common experience.

To the contrary, court decisions subsequent to *Faragher* support the efficacy of anti-harassment policies that provide for making complaints *outside* an employee's chain of command. *See, e.g., Madray*, 208 F.3d at 1299 (complaint procedure allowed employee to complain to persons other than supervisor); *Ritchie v. Stamler Corp.*, 2000 WL 84461 at *3 (6th Cir. Jan. 12, 2000) (procedure required complaints to be made in writing to president of the company); *Watkins v. Professional Security Bureau, Ltd.*, 1999 WL 1032614 at *2, 4 (4th Cir. Nov. 15, 1999) (procedure encouraged employees to contact the director of human resources); *see also EEOC Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, at (C)(1)(c) ("[a]llowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner").

The decisions in this case did not deviate in any way from the established law of employer liability for harassment, and, thus, this case will have no far-reaching implications

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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